

*United States -- Import Prohibition of
Certain Shrimp and Shrimp Products*

Recourse by Malaysia to Article 21.5 of the DSU

FINAL COMMENTS OF THE UNITED STATES

1. In its written and oral submissions, the United States has explained in detail how it has addressed the aspects of the application of Section 609 that resulted in the Appellate Body's finding of arbitrary and unjustifiable discrimination. The United States has also responded to and rebutted Malaysia's claims to the contrary. Accordingly, this Panel should find that the United States has indeed complied with the recommendations and rulings of the Dispute Settlement Body.
2. Malaysia's submission of January 31, 2001 presents few new arguments. With limited exceptions, the United States will rely on its prior written and oral submissions in response.
3. Malaysia's response to the Panel's second question of 23 January 2001, however, calls for additional comment.¹ In explaining why it has not sought certification under the revised, more flexible Section 609 guidelines, Malaysia makes a number claims that are either inaccurate, or inapposite to the issues in this case.
4. First, Malaysia argues that the United States has not complied with the DSB recommendations and rulings because the revised guidelines -- although more flexible -- nonetheless require a reduction of incidental sea turtle mortality in shrimp trawling. As the United States previously explained,² this argument reflects a fundamental misreading of the Appellate Body report. Part of the essential structure of Section 609, as explicitly noted by the Appellate Body, involves a comparison between the programs of the United States for reducing sea turtle mortality *in shrimp fisheries* and the programs adopted by other countries for reducing sea turtle mortality *in shrimp fisheries*. The Appellate Body found that this aspect of Section 609 *was* reasonably related to sea turtle conservation and provisionally within the scope of Article XX(g). In arguing that it is improper for the U.S. to make such comparisons, Malaysia in effect

^{1/} See Malaysia's Submission of 31 January 2001, pages 4-5. In addition, Malaysia's response to Question 4 is incorrect in stating that the United States has volunteered to draft the Conservation and Management Plan (CMP) for the Indian Ocean and South-East Asian Region MOU. As discussed during the hearing, the Government of Australia agreed to prepare a draft CMP based on the meeting in Perth in 1999, and Australia has circulated the draft to the Perth participants.

^{2/} Oral Statement of the United States, para. 11.

is asking the Panel to overturn a central Appellate Body finding.³

5. Second, Malaysia claims that its sea turtle conservation program is "one of the best in the world." As the United States noted in its first submission, the statement upon which Malaysia bases this claim refers only to its program for conserving sea turtle eggs, and not to its program for conserving sea turtles in other phases of their life cycle.⁴ The U.S. measure -- which, as noted, the Appellate Body found to be reasonably related to sea turtle conservation -- is aimed at reducing the incidental mortality of juvenile and adult sea turtles in shrimp fisheries.⁵ In any event, as explained throughout this proceeding, the United States has established revised, more flexible guidelines for determinations under Section 609, and the United States would be pleased to consider the current Malaysian program under those guidelines.

6. Third, Malaysia seems to concede that sea turtles do suffer incidental mortality in Malaysian shrimp fisheries.⁶ Malaysia tries to argue that this fact is irrelevant because "Malaysia does not practice shrimp trawling" and that "the incidental capture of sea turtles in Malaysia is due to fish trawling." These statements, however, simply mean that Malaysian fisherman -- like fisherman elsewhere -- capture both fish and shrimp in their trawl nets, but that Malaysia chooses to call such equipment "fish trawls", not "shrimp trawls." The label, however, is entirely unimportant. If, as Malaysia appears to concede, shrimp in Malaysia are harvested with trawls that cause incidental mortality to endangered sea turtles, then the application of the U.S. measure to Malaysia is both related to sea turtle conservation and nondiscriminatory. The point is that the shrimp that Malaysia seeks to export to the United States are caught by means which will result in the extinction of sea turtles, and that the use of TEDs in Malaysia would all but

^{3/} The problem with flexibility identified by the Appellate Body was that the U.S. guidelines appeared to require exporting nations to adopt a *specific policy* to achieve a particular take rate of sea turtles in shrimp fisheries. As explained in prior U.S. submissions, this flaw has been explicitly addressed in the revised U.S. guidelines. The guidelines are very clear that countries seeking certification may select any policy for reducing sea turtle mortality in shrimp fisheries, so long as the result is comparable to the U.S. program in terms of sea turtle conservation

^{4/} See First U.S. Submission, para. 62, note 33.

^{5/} As the United States explained exhaustively in the original Panel proceedings, and as the experts testified, sea turtle conservation requires the reduction of all aspects of sea turtle mortality. See, e.g., United States First Submission to the Panel, paras. 41-47 (June 9, 1997).

^{6/} See Malaysia's Submission of 31 January 200, para. 5.2 ("... in Malaysia shrimp is a by-catch from fish trawling activities. The incidental capture of of sea turtles in Malaysia is due to fish trawling."); *id.* para. 5.6 (In Malaysia, turtles caught as incidental by-catch are only in fish trawling."). The record in the original proceeding further indicates that Malaysian trawls used in shrimp fishing have been a substantial cause of sea turtle mortality. "In interviews with Malaysian fishermen on the subject of incidental capture of sea turtles in fishing gear in Terengganu [, Malaysia], 68 percent of the fishermen who used trawl nets reported incidental captures of sea turtles. ... Moreover, the sea turtles captured in trawl nets almost always drowned before they could be released." United States Second Submission to the Panel, para 28. (July 28, 1997). The record also shows that certain populations of sea turtles in Malaysia are on the verge of extinction. The Terengganu, Malaysia stock of nesting olive ridley turtles has shrunk from possibly thousands annually to approximately 20 each year. United States First Submission to the Panel, para. 16 (June 9, 1997).

eliminate this source of sea turtle mortality.

7. Finally, after seemingly conceding that sea turtle mortality results from Malaysian trawls, Malaysia makes the directly contradictory statement that "in Malaysia, sea turtle mortality are not due to fishery activities, but are attributed to other causes, for instance pollution." If this statement is true with respect to all or part of Malaysia, there is no reason why Malaysia could not export shrimp to the United States under the revised, more flexible guidelines, just as Australia may do with respect to shrimp from the Spencer Gulf region. Again, however, Malaysia has never even attempted to raise this matter with the United States under the revised guidelines.

8. For these reasons and for the reasons presented in the prior written and oral submissions of the United States, the Panel should find that the United States has complied with the recommendations and rulings of the DSB.